GOH KOOI PHENG

v.

PP

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
SYED AHMAD HELMY JCA
AZAHAR MOHAMED JCA
[CRIMINAL APPEAL NO: P-05-135-2010]
30 JANUARY 2012

CRIMINAL LAW: *Murder - Penal Code, s. 302 - Appeal against conviction and sentence - Identification of accused - Manner in which identification parade ('parade') held - Whether age disparities between persons in parade unfair to appellant - Whether flaw in parade undermined subsequent dock identification - Whether identity of person who shot deceased proved - Whether witness an interested witness - Whether care and caution exercised by trial judge - Whether conviction sustained*

EVIDENCE: *Identification parade - Conduct of - Whether age disparities between persons in parade unfair to appellant - Whether flaw in parade undermined dock identification - Whether conviction sustained*

EVIDENCE: *Witness - Interested witness - Whether trial judge appraised testimony of interested witness with extreme care and caution - Whether there was misdirection warranting appellate intervention*

The appellant was convicted and sentenced to death in the High Court for the offence of murder under s. 302 of the Penal Code. Whilst the offence took place at the deceased's hand phone shop ('shop'), PW4 and PW8, who were employees of the deceased, were present at the shop. According to PW4, the appellant came to the shop to purchase a RM100 prepaid card and at that moment, as PW4 was walking to the counter to get the prepaid card from PW8, PW4 heard a loud shooting sound which came from the direction where the appellant was standing. The deceased was then found sprawling on the floor with his head bleeding profusely. Similarly, PW8 stated that he was bending down to look for the prepaid card when he heard a "pomp" sound and found the deceased sprawled on the floor. Then, PW8 rushed out from the shop and saw the appellant sped off from the

A scene with a motorcycle. Dissatisfied with the decision of the High Court, the appellant raised these arguments in his appeal, *ie*, (i) that the trial judge failed to appreciate that the identification parade held was a nullity and hence, the subsequent dock identification of the appellant by PW4 and PW8 assumed little
B significance; and (ii) in relation to the trial judge's appreciation of PW4 and PW8's evidence.

Held (allowing appeal; quashing conviction and sentence)
Per Azahar Mohamed JCA delivering the judgment of the
C **court:**

(1) Where a witness identifies an accused person who is not known to him in court for the first time, his evidence is of little value unless there had been a previous identification parade. Whether the flaw occurred during the identification
D parade would undermine subsequent dock identification must depend upon the facts of the particular case. On the facts, there was a flouting of procedural requirement in the manner the identification parade was held in that there were significant age disparities between the persons in the identification
E parade. The manner the identification parade was held was unfair to the appellant. Since the dock identification was of little value and unreliable, it was unsafe to sustain the appellant's conviction. (para 5)

F **(2)** The learned judge misdirected himself in relation to the evidence of PW4 and PW8. PW8 confirmed that he did not see the appellant holding any weapon nor saw him firing the shot at the deceased. PW8 also stated that he merely assumed that it was the appellant who fired the shot. His evidence,
G therefore, did not serve to prove the identity of the person who fired the shot at the material time. (paras 6 & 7)

(3) PW4 did not see the appellant holding any weapon or let alone seeing the appellant pulling the trigger of any firearm.
H PW4's insistence that the appellant was the one who fired the shot at the material time did not necessarily make him a witness of truth. By reason of the unsatisfactory feature in PW4's evidence whose evidence was the only direct evidence to prove the identity of the person who fired the shot at the
I material time, it could hardly be said that the prosecution had proved its case beyond all reasonable doubt against the appellant on the charge. (para 9)

(4) PW4 was an interested witness and bearing in mind the surrounding circumstances of this case, it was the duty of the learned judge to appraise the testimony of the interested witness with extreme care and caution. However, this was not done satisfactorily. Nowhere in his judgment did the trial judge direct his mind that PW4 was an interested witness. This was a serious non-direction which amounted to misdirection by the learned trial judge warranting appellate intervention. (para 10)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh dan dihukum mati di Mahkamah Tinggi bagi kesalahan membunuh di bawah s. 302 Kanun Keseksaan. Semasa kesalahan berlaku di kedai telefon bimbit si mati ('kedai'), PW4 dan PW8, yang merupakan pekerja-pekerja si mati, berada di kedai itu. Menurut PW4, perayu telah datang ke kedai untuk membeli kad prabayar sebanyak RM100 dan pada masa itu, apabila PW4 berjalan ke kaunter untuk mendapat kad prabayar itu daripada PW8, PW4 telah mendengar bunyi tembakan yang datang dari arah di mana perayu berdiri. Si mati kemudiannya dijumpai rebah di atas lantai dengan kepalanya berdarah dengan banyaknya. Begitu juga, PW8 menyatakan bahawa beliau membongkok untuk mencari kad prabayar itu apabila terdengar bunyi "pomp" dan menjumpai si mati rebah di atas lantai. Kemudian, PW8 terus keluar dari kedai dan melihat perayu beredar meninggalkan tempat kejadian dengan sebuah motosikal. Tidak puas hati dengan keputusan Mahkamah Tinggi, perayu membangkitkan hujahan-hujahan ini di dalam rayuannya, iaitu, (i) bahawa hakim bicara gagal menghargai bahawa kawad cam yang diadakan adalah tak sah dan oleh itu, pengecaman perayu dalam kandang saksi seterusnya oleh PW4 dan PW8 kurang nilainya; dan (ii) berkenaan penilaian hakim bicara terhadap keterangan PW4 dan PW8.

Diputuskan (membenarkan rayuan; membatalkan sabitan dan hukuman)
Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:

(1) Di mana seseorang saksi mengecam seseorang tertuduh yang tidak dikenali olehnya di mahkamah untuk kali pertama, keterangan beliau mempunyai sedikit nilai kecuali adanya kawad cam sebelum itu. Sama ada kecacatan berbangkit semasa kawad cam akan melemahkan pengecaman dalam kandang saksi berikutnya bergantung kepada fakta sesuatu kes.

A Berdasarkan fakta, terdapat kehendak prosedur yang telah dilanggar berkenaan cara kawad cam diadakan di mana terdapat jurang umur yang ketara di antara peserta-peserta dalam kawad cam tersebut. Cara kawad cam dijalankan adalah tidak wajar terhadap perayu. Memandangkan pengecaman
B dalam kandang saksi mempunyai nilai yang sedikit, maka, adalah tidak selamat untuk mengekalkan sabitan perayu.

(2) Yang arif hakim telah tersalah arah berkenaan keterangan PW4 dan PW8. PW8 mengesahkan bahawa beliau tidak melihat
C perayu memegang sebarang senjata atau pun melihatnya melepaskan tembakan terhadap si mati. PW8 juga menyatakan bahawa beliau menyangka perayu yang melepaskan tembakan. Keterangan beliau tidak membuktikan identiti orang yang telah melepaskan tembakan pada masa material.

D **(3)** PW4 tidak melihat perayu memegang sebarang senjata atau pun melihat perayu menarik picu senjata api. Desakan PW4 bahawa perayu merupakan orang yang telah melepaskan tembakan pada masa meterial tidak menjadikan beliau seorang saksi yang benar. Disebabkan kelemahan dalam keterangan
E PW4 yang merupakan satu-satunya keterangan langsung untuk membuktikan identiti orang yang telah melepaskan tembakan pada masa material, tidak boleh dikatakan bahawa pendakwaan telah membuktikan kesnya melampaui keraguan munasabah terhadap perayu atas pertuduhan.
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(4) PW4 merupakan saksi berkepentingan dan memandangkan hal keadaan persekitaran kes ini, adalah tugas yang arif hakim untuk menilai keterangan saksi berkepentingan dengan cermat dan berhati-hati. Walau bagaimanapun, perkara ini tidak
G dilakukan dengan memuaskan. Tidak dijumpai di mana-mana pun dalam penghakiman di mana hakim bicara menuju mindanya bahawa PW4 merupakan saksi berkepentingan. Ini merupakan ketidakarahan serius yang menyebabkan suatu salah arah oleh yang arif hakim yang mewajarkan campur tangan
H rayuan.

Case(s) referred to:

Arumugam Muthusamy v. PP [1998] 3 CLJ 597 FC ***(refd)***
Balasingam v. PP [1959] 1 LNS 105 HC ***(refd)***
Gooi Loo Seng v. PP [1993] 3 CLJ 1 SC ***(refd)***
I *Kanan v. State of Kerala AIR 1979 SC 1127* ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
PP v. Mohamed Majid [1976] 1 LNS 104 HC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***
Zahari Yeop Basri & Anor v. PP [1977] 1 LNS 162 HC ***(refd)***

Legislation referred to:
Penal Code, s. 302

Other source(s) referred to:
Mallal's Criminal Procedure, 4th edn, p 155

For the appellant - Harpal Singh Gill; M/s Harpal Singh & Co
For the respondent - Kwan Li Sa; DPP

Reported by Kumitha Abd Majid

JUDGMENT

Azahar Mohamed JCA:

[1] The appellant was tried in the High Court at Georgetown on the following charge:

> Bahawa kamu pada 30 Mac 2003, di antara jam 10.15 malam hingga 10.30 malam, di Kedai Winner Communication, 224 PDC Flat, Lebuh Macallum, Pengkalan Weld, di dalam Daerah Timur Laut, di dalam Negeri Pulau Pinang, dengan niat telah melakukan pembunuhan iaitu dengan menyebabkan kematian Yeoh Boon Khneg, No KP: 651020-07-5827 (A0253458), dan dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] He was convicted and sentenced to death for the offence of murder under s. 302 of the Penal Code. He appealed to this court against the conviction and sentence. We heard the appeal wherein at its conclusion we unanimously allowed it. As a result, the conviction was quashed and the sentence set aside. We now give the reasons of our decision.

[3] The brief facts adduced by the prosecution giving rise to the charge of murder against the appellant were as follows. Goh Yew Chai (PW4) was an employee at the deceased's Winner Communication handphone shop. Whilst Teh Koon Hee (PW8) was an employee at the deceased's construction company. PW8 used to help out at the deceased's Winner Communication at night. Both of them said that on 30 March 2003 they were at the said handphone shop together with one Ah Kooi, who was another employee of the deceased. It appears from the prosecution's case that Ah Kooi's role assumed little significance as he was sleeping at that material time. According to PW4 on the day in question at about 9pm the appellant came to the shop and wanted to purchase a RM30 prepaid card. The appellant left

A when he was informed that the prepaid card was out of stock. After that, at about 10.15pm, the deceased arrived at the shop. At about 10.30pm, PW4 said that the appellant appeared again by pushing the glass door of the shop's entrance. According to PW4 this time around, the appellant asked for a RM100 prepaid B card. PW4 who was then standing next to the counter went forward to the appellant and took the RM100 from the appellant. At that moment, as he was walking to the counter to get the prepaid card from PW8, PW4 heard a loud shooting sound coming from the direction of where the appellant was standing. He then C saw the deceased was sprawling on the floor with his head bleeding profusely. PW8 said that as he was bending down to look for the prepaid card when he heard a "pomp" sound and he then saw the deceased sprawling on the floor. PW8 then said he rushed out from the shop and saw the appellant sped off from the D scene with a motorcycle parked at the corridor of the shop.

[4] When this appeal came before us, learned counsel for the appellant urged us that the appeal should be allowed principally on two main grounds.

E **[5]** The first ground advanced by learned counsel for the appellant concerned the failure by the learned trial judge to appreciate that the identification parade held by Chief Inspector Karunaagaran (PW9) was a nullity and hence the subsequent dock F identification of the appellant by PW4 and PW8 assumed little significance. Where a witness identifies an accused person who is not known to him in court for the first time, his evidence is of little value unless there has been previous identification parade identification (see *Kanan v. State of Kerala* AIR 1979 SC 1127). In *Arumugam Muthusamy v. PP* [1998] 3 CLJ 597, the Federal G Court held that dock identification of an accused person for the first time at the trial is undesirable. In the instant case, the prosecution during the trial conceded that the identification parade conducted by PW9 was a nullity as half of the 11 participants in the parade were teenagers compared to the appellant who was H then 40 years old. We accept the general principle that it did not follow, just because the learned trial judge rejected the identification at the identification parade, he must of necessity also reject the dock identification of the appellant (see *Ong Poh Cheng v. PP* [1998] 4 CLJ 1). In our view, whether the flaw occurred during I the identification parade would undermine subsequent dock identification must depend upon the facts of the particular case. In our judgment, in the present case, there was a flouting of

procedural requirement in the manner the identification parade was held in that there were significant age disparities between the persons on the identification parade (see *Mallal's Criminal Procedure*, 4th edn, at p. 155). In our view, the manner the identification parade was held was unfair to the appellant. In the circumstances of the present case, we therefore found merit in learned counsel's contention that the subsequent dock identification by PW4 and PW8 was of little value or significance as was held in the case of *PP v. Mohamed Majid* [1976] 1 LNS 104. The identification of the appellant was an essential matter to be proved by the prosecution. Since the dock identification was of little value and unreliable, it was unsafe to sustain the appellant's conviction.

[6] More important still, we turn now to consider the second ground raised by learned counsel, which was in relation to the appreciation of the evidence of PW4 and PW8 on the part of the learned trial judge. First, we shall deal with the evidence of PW8. In his grounds of judgment, the learned trial judge said that, "according to SP4 and SP8 who were both at the material time inside that shop, it was the accused today who fired the shot". In our view, the learned judge misdirected himself on this point. Now, PW8 never said in his testimony that it was the appellant who fired the shot. What PW8 said in examination-in-chief with regard to this critical issue runs as follows:

> Apabila saya tunduk ke bawah untuk mengambil prepaid card yang diminta saya terdengar bunyi 'pomp' seperti bunyi pistol. Saya tidak pernah dengar bunyi letupan pistol. Tetapi bunyi yang saya dengar tersebut seperti bunyi bom yang sangat kuat dan datangnya dari dalam kedai tersebut. Ketika saya bangun dari tunduk dan lihat ke atas, kedai tersebut penuh dengan asap.

Later, when cross-examined on the same issue, PW8 said:

> S : Kamu kata kamu dengar letupan dan asap.
>
> J : Ya.
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> S : Oleh itu kamu tidak nampak penembakan.
>
> J : Ya, tidak nampak penembakan.
>
> S : Oleh itu kamu juga tidak nampak apa-apa senjata.
>
> J : Ya, tidak nampak apa-apa senjata.

S : Oleh itu bila kamu kata tertuduh menembak Kau Kia adalah satu anggapan sahaja.

J : Ya, saya tidak nampak Tertuduh menembak Kau Kia kerana saya sedang tunduk mengambil prepaid card.

[7] PW8 confirmed that he did not see the appellant holding any weapon nor seeing him firing the shot at the deceased. It can be seen from the extract of his evidence quoted above that he merely assumed that it was the appellant who fired the shot. His evidence, therefore, did not serve to prove the identity of the person who fired the shot at the material time.

[8] This brings us to the evidence of PW4. The material parts of his evidence are as follows:

> Setelah Ah Chow menyerahkan prepaid card kepada saya, tiba-tiba saya terdengar satu bunyi tembakan dilepaskan dan saya lihat majikan saya Kau Kia telah jatuh ke atas lantai dan orang yang menembaknya telah menghilangkan diri. Saya tidak tahu ke mana orang yang menembak tersebut pergi. Bunyi tembakan tersebut adalah kuat yang saya lihat dilepaskan oleh orang menembak tersebut. Ketika itu saya sedang memandang ke arah orang yang menembak tersebut dan saya dapat rasakan seperti satu percikan api atau 'sparks' seperti percikan mercun ke atas muka saya. Percikan api tersebut datang dari arah orang yang menembak yang berada di dalam kedai tersebut. Tiada apa-apa yang berlaku kepada muka saya, selain rasa seperti satu percikan ke arah muka saya.

[9] PW4 did not see the appellant holding any weapon or let alone seeing the appellant pulling the trigger of any firearm. According to him he saw some sparks on his face. On the facts, therefore, the truth of his evidence quoted above is questionable. PW4's insistence that the appellant was the one who fired the shot at the material time did not necessarily make him a witness of truth. Having regard to all the surrounding circumstances, his evidence became open to a least a reasonable doubt. By reason of the unsatisfactory feature in the evidence of PW4 whose evidence was the only direct evidence to prove the identity of the person who fired the shot at the material time, it can hardly be said that the prosecution had proved its case beyond all reasonable doubt against the appellant on the charge of the offence of murder.

[10] Furthermore, PW4 was arrested by the police after the deceased's death and was subsequently remanded. He was released only after he attended the identification parade where he purportedly identified the appellant (see p. 53 of the Appeal Record (AR)) and had helped the police in drawing a photo fit of the appellant (p. 41 of AR). In that sense, he is a person who has some direct interest in the outcome of the trial against the appellant. As such, we accept the submission of learned counsel that PW4 was an interested witness. This is not to say that as an interested witness PW4 was a witness that should not be believed (see *Balasingam v. PP* [1959] 1 LNS 105). However, bearing in mind the surrounding circumstances of this case, it was the duty of the learned judge to appraise the testimony of the interested witness with extreme care and caution. This was not done satisfactorily. The audio-visual advantage reserved to the trial judge had been missed. Nowhere in his judgment did the learned trial judge direct his mind that PW4 was an interested witness. In our view, this is a serious non-direction which amounts to a misdirection by the learned trial judge warranting appellate intervention. In this regard, Edgar Joseph Jr SCJ in *Gooi Loo Seng v. PP* [1993] 3 CLJ 1 said:

> Clearly, therefore, the trial judge, was bound to, but did not view the whole of the evidence objectively and from all angles, with the result that the appellant had lost the chance which was fairly open to him of being acquitted. On this point, we consider that non direction amounts to a misdirection, for, in the words of Pickford J in *R v. Bundy* 5 Cr App R 2701:
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> > The trial was not satisfactory, and the case was not put to the jury in a way to ensure their due appreciation of the value of the evidence. We must treat the failure of a trial Judge sitting alone, to direct himself correctly in the same way as a failure to direct a jury correctly. In these circumstances, a miscarriage of justice may well have occurred.

[11] Moreover, apart from what we have stated previously, there is certain material absence of evidence, which in the circumstances of the present case rendered the appellant's conviction unsafe. There was no weapon recovered or produced in court. Nor was there DNA evidence produced during the trial. There were also no finger prints of the appellant on the RM100 note or the glass door of the shop. The RM100 note itself was not produced in the court during the trial.

[12] After having scrutinized the entire AR with care and carefully examined the judgment of the learned judge and for all the reasons already given, we were of the view that the appellant's conviction was wholly unsafe in the interest of justice (see *Zahari Yeop Basri & Anor v. PP* [1977] 1 LNS 162). As stated in *Sia Soon Suan v. PP* [1965] 1 LNS 165:

> The requirement of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else. This is axiomatic.

[13] This appeal was, therefore, allowed. Accordingly, we quashed the conviction and sentence.